OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 88-9 September 1, 1988

TO: All Regional Directors, Officers-In-Charge and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Reinstatement and Backpay Remedies for Discriminatees Who Are "Undocumented Aliens"

This memorandum sets forth guidance for determining whether the normal remedies of reinstatement and backpay for discriminatees should be sought where the employer contends that the discriminatees are undocumented aliens. This memorandum supersedes all prior General Counsel and Operations Management memoranda on the subject.

I. Employees hired on or before November 6, 1986.

In Sure Tan, Inc. v. NLRB, 1/ the Supreme Court held that where a group of undocumented discriminatees acceded to voluntary deportation by the INS on the day of their unlawful "discharge," the Board's traditional remedies must be conditioned upon the employees' legal readmittance to the U.S. This result was necessary in order to avoid a conflict with U.S. immigration policy. More particularly, the Court held that reinstatement must be conditioned on the employees' legal reentry into the U.S., and that backpay must be tolled during any period when the employees were not "lawfully entitled to be present and employed in the United States." Id. Subsequently, the Board has conditioned the reinstatement and backpay remedies of discriminatees upon their being lawfully entitled to be present and employed in the U.S. 2/

1/ 467 U.S. 883, 902-903 (1984).

2/ See Caamano Brothers, Inc., 275 NLRB 205, n. 1 (1985); Felbro, Inc., 274 NLRB 1268, 1269 (1985), enf. granted in part, and denied in rel. part, 795 F.2d 705, 122 LRRM 3113 (9th Cir.

Neither the Court nor the Board, however, has ever addressed the question of who bears the burden of proving lawful entitlement to be present and employed, or what evidence would establish such proof. We conclude that this burden should be borne by the wrongdoer who seeks to avoid the normal remedies. 3/ We also conclude that this burden can be met by a respondent only by proffering a final INS determination that a discriminatee is not lawfully entitled to be present and employed in the U.S. 4/ Because only the INS can make the determination that would satisfy this burden, it would be neither necessary nor proper to address a discriminatee's immigration status in litigation before the Board. As a result, the Board will not be called upon to decide an issue that is not within its expertise. 5/

Proceedings before the Board, including settlement efforts, should not be held in abeyance pending the outcome of any INS proceeding to determine immigration status. A discriminatee is entitled to reinstatement and backpay unless and until the INS rules that the discriminatee is not entitled to be present and employed in the U.S. For, until the INS determines that an individual is not lawfully entitled to be present and employed in the U.S., a Board order requiring reinstatement and backpay does

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1986). The Board has not acquiesced to the view of the Ninth Circuit that reinstatement and backpay are appropriate where the discriminatees are physically, albeit unlawfully, present in the U.S.

3/ See Fixtures Mfg. Corp., 251 NLRB 778 (1980), enfd. in part, remanded in part, 109 LRRM 2581 (8th Cir. 1982)(the burden of substantiating facts that would render a discriminatee unfit for reinstatement is on the party seeking to block reinstatement).

4/ The Regions should submit to Advice any cases that present the question whether a respondent could rely upon an INS determination that has been appealed.

5/ See Garment Workers Local 512 v. NLRB (Felbro), 795 F.2d 705, 720-22, 122 LRRM 3113, 3124-25 (9th Cir. 1986), for a discussion of the complexity of federal immigration laws and the many avenues of achieving lawful entitlement to be "present and employed."

not conflict with immigration law or policy. See Sure-Tan, 467 U.S. at 902-903, citing Southern S.S. Co. v. NLRB, 316 U.S. 31, 47, 10 LRRM 544 (1942). Moreover, by continuing to process the case before the Board, significant delays occasioned by potentially lengthy INS proceedings will be avoided.

This conclusion is not contrary to the provisions of the Immigration Reform and Control Act of 1986 (IRCA). 6/ IRCA was enacted on November 6, 1986, and provides, inter alia, for the adjustment to lawful temporary resident status (TRS) of certain individuals who have maintained continuous unlawful residence in the U.S. since January 1, 1982. The application period for adjustment to TRS commenced on May 5, 1987, and ended on May 5, 1988. 7/ In addition, IRCA makes it unlawful for an employer to knowingly hire and/or continue to employ "unauthorized aliens." IRCA places on employers an employment verification requirement. Pursuant to that requirement, a "Form I-9" must be completed for all employees hired after November 6, 1986. 8/ An employer's hiring of an employee, without compliance with these requirements, may result in penalties.

In view of these provisions, an employer may argue that the reinstatement of an employee who refuses to complete his/her portion of a Form I-9 exposes the employer to potential criminal liability. We would reject the argument. The penalty provisions and verification requirements do not apply to periods of employment that began on or before November 6, 1986, and continued without interruption after that date. Employees who fall within this exception are considered "grandfathered." In our view, an unlawful discharge would not constitute an interruption in service. In this regard, the applicable INS regulations provide that the "grandfather" requirement of continuing employment is met where an employee is reinstated after a wrongful termination and where an employee continued employment with a successor employer. See IRCA final rules,

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6/ P.L. 99-603, 8 U.S.C. Sec. 1001 et. seq., as amended.

7/ There are certain exceptions not relevant here.

8/ The employee completes one portion of the form and the employer completes another.

Control of Employment of Aliens, 8 C.F.R. Sec. 274a.2(b)(viii)(E),(G).

Thus, an employer who reinstates a discriminatee who was originally hired prior to November 6, 1986, need not comply with the employment verification requirements of IRCA. Neither must a Burns 9/ successor comply with such requirements for any employee hired by its predecessor prior to November 6, 1986, and discriminatorily not hired by the successor or discriminatorily fired by the successor. Accordingly, by ordering the normal remedies of reinstatement and backpay for discriminatees who are "grandfathered" under IRCA and who have not been proven by an employer to be "illegal" under immigration law, the Board would not be acting in conflict with immigration law or policy. 10/

We also conclude that such a discriminatee's rights to reinstatement and backpay would not be defeated either by a failure to apply for adjusted status under IRCA or by an adverse finding by the INS on any such application. Thus, as stated above, the burden would be on an employer to prove, by a final INS determination, that the discriminatee is not lawfully entitled to be present and employed in the U.S. If no such determination exists, the employer has not met its burden, even where the discriminatee has not applied for lawful status under IRCA or any other provision of the Immigration and Nationality Act. Moreover, we note that a denial of adjusted status under IRCA does not constitute a determination that an individual is not entitled to be present and employed in the U.S. An individual may qualify to be present and employed under some other provision of the immigration laws even though not eligible for amnesty. In fact, the INS may not deport an applicant in reliance upon information obtained pursuant to a TRS application. INS can rely on such information only to make a determination of TRS eligibility and to punish an applicant for making false

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9/ NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 80 LRRM 2225 (1972).

10/ This conclusion resolves the question of entitlement to gross backpay. The Regions should submit to Advice any cases that present the question whether an employee's failure to seek or obtain interim employment because of an inability to satisfy the I-9 requirements affects net backpay.

statements on the application. 11/ An INS determination, therefore, that a discriminatee is not entitled to TRS under IRCA, would not satisfy an employer's burden to defeat reinstatement and backpay.

If an employer does proffer a final INS determination that a discriminatee is not lawfully present and entitled to work, reinstatement would not be available under Sure-Tan. We conclude, however, that backpay should still be sought for the period prior to the final INS ruling, assuming that the discriminatee was in the U.S. and otherwise available for work during this period. In this regard, we note that the Supreme Court has not resolved this issue. That is, the discriminatees in Sure-Tan were deported prior to any backpay period, and thus the Court did not have to rule on whether backpay may be awarded for periods when a discriminatee was in the U.S. However, the Court has since suggested that backpay would be available. In INS v. Lopez-Mendoza, 12/ the Court indicated that, under Sure-Tan, retrospective sanctions (presumably backpay) may be imposed against an employer by the NLRB for unfair labor practices involving illegal aliens. Moreover, backpay for such a period is appropriate because it should be presumed that a discriminatee is lawfully present and entitled to work until the contrary is shown. Thus, backpay should be awarded for any period during which that presumption was operative. Accordingly, even if an employer should satisfy its burden by proffering a final INS determination that a discriminatee is not lawfully present and entitled to be employed, it will have rebutted the presumption of legality only from that time forward. Therefore, although the discriminatee's reinstatement rights would be defeated, backpay would run until the date of the INS ruling.

11/ 8 U.S.C. Sec. 1255A(c)(5), "Adjustment of Status of Certain Entrants Before January 1, 1982, to That of Person Admitted for Lawful Residence ... Confidentiality of Information."

12/ 468 U.S. 1032, 1047-8 n. 4 (1984).

II. Employees hired after November 6, 1986

IRCA provides that an employer who knowingly employs an "unauthorized alien" who commenced employment after November 6, 1986 is subject to criminal sanctions. Accordingly, for employees hired after that date, employers must comply with the IRCA verification requirements by receiving from each employee his/her completed portion of the I-9 form and completing the employer portion of the form.

In view of the foregoing, if the employer offers reinstatement to a discriminatee, and that discriminatee is unwilling to complete the employee portion of Form I-9, we would not require that the employer hire the discriminatee and we would not seek backpay for subsequent periods. The public policy of the U.S., as expressed in the criminal sanction provisions of IRCA, is that persons who do not file a Form I-9 are not to be employed. In keeping with that policy, we would not seek reinstatement for such persons. 13/

A contrary result is not required by the legislative history of IRCA. Concededly, that history indicates that IRCA was not intended to change existing law or to limit the remedial powers of the NLRB. 14/ However, as the relevant committee report points out, Sure-Tan was the existing law and that decision itself limited the remedial powers of the NLRB. Clearly, Congress did not intend to overrule Sure-Tan. And, as noted supra, it is Sure-Tan, not IRCA, that limits the power of the NLRB to order reinstatement and backpay to an employee who is not "entitled to be employed" in the U.S.

13/ If the discriminatee does complete the form I-9, we would seek reinstatement. However, if the employer contends that it has a reasonable basis for believing that the documentation submitted with the form is fraudulent, the case should be submitted to Advice.

14/ H.R. Rep. No. 99-682, 99th Cong. 2d Sess., pt. 1, at 58 (1986); H.R. Rep. No. 99-682, 99th Cong. 2d Sess., pt. 2, at 8-9 (1986).

Even if the employee cannot or will not comply with the I-9 verification requirements and therefore cannot obtain reinstatement, we would, nonetheless, seek backpay for such an individual for any portion of the backpay period during which he or she could meet the I-9 requirements. For such periods, an employer could not validly claim that it is subject to sanctions for having employed the employee.

Cases which present issues not resolved by this memorandum should be submitted to Advice. 15/

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15/ In particular, we note that this memorandum deals only with cases where an employee was unlawfully terminated. If the case involves other forms of discrimination (e.g., reduction in pay or reassignment), backpay may be available, even if the employee has been adjudicated to be an undocumented alien. See Patel v. Quality Inn South, 846 F.2d. 700 (11th Cir. 1988).